STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 20,854
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report that the petitioner neglected her child, and she requests that the Board expunge the report from the child abuse registry maintained by the Department. The Department has moved for summary judgement based on findings by the Family Court regarding the incident in question. The issue is whether the findings of the Family Court are binding on the Board as a matter of collateral estoppel.

ORDER

The Department's decision is partially affirmed as a matter of collateral estoppel. The matter is remanded to the hearing officer to determine whether there are any remaining issues.

DISCUSSION

The petitioner has made an application for an order to expunge a substantiation of neglect placed by SRS in its registry. This application is governed by 33 V.S.A. § 4916, (since amended) which provides in pertinent part as follows:

> (h) A person may, at any time, apply to the human service board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10). Abuse and neglect are specifically defined in the statute in pertinent part as follows:

> (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . .
>
> (3) "Harm" can occur by:
>
> . . .

> (B) Failure to supply the child with adequate food, clothing, shelter or health care. . .
>
> 33 V.S.A. § 4912

There is no dispute in this matter that at a merits hearing held by the Family Court on August 1, 2006 on a Termination of Parental Rights Petitioner (TPR) filed by the Department (*In re: E.M.* 374-7-04Cnjv) concerning this child the Court made the following findings:

> On July 23, 2004 (paternal grandmother) took (child), then 4 months old, to (hospital) emergency room because she feared that the baby was far too thin and weak. (Child) was admitted for three days. While in the hospital she ate a great deal and put on weight. (Petitioner) had previously denied that (child) was failing to gain weight and told (grandmother), "I won't have a fat baby just to please you." It is clear from the evidence that (petitioner) was not providing enough food for (child). She was having difficulty producing enough breast milk and was not providing formula or other nutrition for her baby.

In discussing those findings, later in the same ruling, The Court observed:

> There have been two problems with (petitioner's) relationship with her children. First, she has been consistently reluctant to obtain good medical care for her children. . .When (child) was little, she did not provide enough food for the baby. These behaviors appear to be rooted in beliefs about herbal remedies and in her own concerns about weight gain and appearance.

The Family Court's Order terminating the petitioner's parental rights was affirmed by the Vermont Supreme Court in January 2007 (Docket No. 2006-333).

The Board has adopted the doctrine of collateral estoppel in prior proceedings and has relied on the test established in Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990), to determine whether it is precluded by the findings in a Family Court proceeding from making its own findings in the context of an expungement hearing. See Fair Hearings No. 11,444, 12,309, 13,432, and 13,517. The criteria set forth by that Court are as follows:

(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;

(2) the issue was resolved by a final judgment on the merits;

(3) the issue is the same as the one raised in the later action;

(4) there was a full and fair opportunity to litigate the issue in the earlier action; and

(5) applying preclusion in the action is fair.

Id at 265.

In this matter, the petitioner was a party in the earlier Family Court proceeding. The matter was resolved by a final judgment on the merits in the Family Court and became final when the Vermont Supreme Court affirmed the Family Court's decision. One of the issues in this matter, whether facts exist which constitute the petitioner harming her child by failing to provide her with adequate food, was clearly

resolved by the Family Court, which specifically found that the petitioner "was not providing enough food", which led to the child's hospitalization. Whether or not the petitioner continues to contest these findings, it is clear that she had a full and fair opportunity to litigate this issue in the TPR proceeding in Family Court.

It cannot be concluded that the Department's substantiation of harm based on the petitioner's failure to provide "health care" is similarly resolved by the Family Court's findings. Although the child was brought to the hospital by her grandmother, and admitted for three days, there is no specific finding by the court that the petitioner actually *withheld* necessary medical care from the child. Although such a finding may be *reasonable* based solely on the Family Court's ruling, if the petitioner contests it, this issue cannot be considered "resolved" by the Court.

The above notwithstanding, the petitioner's appeal appears to be based mostly on her dispute with the Department basing its neglect findings on a medical diagnosis that the child had "failure to thrive". However, in light of the precise language of 33 V.S.A. § 4912(3) (*supra*) and Family Court's finding that the petitioner failed to provide enough food, this argument is deemed purely semantic. It may be of

relevance to the issue of failure to provide *medical care*, but is of no legal consequence to the issues regarding food.

Inasmuch as the Trepanier test (*supra*) is clearly met regarding the petitioner's failure to provide her child with adequate food, the Department's request for a preliminary ruling in its favor on this issue must be granted. The parties should advise the hearing officer if this ruling does not also resolve any remaining issues in the matter.

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